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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *
7 IN RE: WESTERN STATES)
8 WHOLESALE NATURAL GAS)
9 ANTITRUST LITIGATION,)
10 _____) 2:06-CV-0233-PMP-PAL
11 LEARJET, INC., et al.,)
12 Plaintiffs,) 2:03-CV-1431-PMP-PAL
13 v.) BASE FILE
14 ONEOK, INC., et al.,)
15 Defendants.)
16 _____)
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15 Presently before the Court is Defendant Duke Power Company LLC's Motion to
16 Dismiss for Lack of Personal Jurisdiction (2:03-CV-1431-PMP-PAL, Doc. #427; 2:06-CV-
17 0233-PMP-PAL, Doc. #58), filed on September 29, 2006. On November 14, 2006,
18 Plaintiffs filed a Response to Defendants'¹ Motions to Dismiss for Lack of Personal
19 Jurisdiction (2:06-CV-0233-PMP-PAL, Doc. #70). Defendants filed a Reply (2:03-CV-
20 1431-PMP-PAL, Doc. #450) on December 22, 2006.

21 **I. BACKGROUND**

22 This case is one of many in consolidated Multi District Litigation arising out of
23 the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the District

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26 ¹ Four different Defendants filed motions to dismiss for lack of personal jurisdiction in this case raising similar issues and making similar arguments. Plaintiffs filed a consolidated response addressing all four motions to dismiss based on personal jurisdiction. The moving Defendants subsequently filed a joint Reply.

1 Court of Wyandotte County, Kansas. (Notice of Removal, Am. Compl. [2:06-CV-0233-
2 PMP-PAL, Doc. #1].) Defendants removed the case to the United States District Court for
3 the District of Kansas. (Id.) The Judicial Panel on Multidistrict Litigation entered a
4 Transfer Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court
5 for coordinated or consolidated pretrial proceedings. (Letter dated June 14, 2006 [2:06-CV-
6 0233-PMP-PAL, Doc. #41-1].)

7 In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate
8 payers. In the First Amended Complaint, Plaintiffs allege Defendants engaged in anti-
9 competitive activities with the intent to manipulate and artificially increase the price of
10 natural gas for consumers. (Am. Compl. at 30-32.) Specifically, Plaintiffs allege
11 Defendants knowingly delivered false reports concerning trade information and engaged in
12 wash trades, which conduct violated Kansas Statutes Annotated § 50-101, et. seq. (Id.)

13 Plaintiff Learjet, Inc. (“Learjet”) is a Delaware corporation with its principal
14 place of business in Wichita, Kansas. (Id. at 3.) Plaintiff Cross Oil Refining & Marketing,
15 Inc. (“Cross Oil”) is a Delaware corporation with offices located in Kansas. (Id.) Plaintiff
16 Topeka Unified School District 501 (“Topeka”), is a local government unit, organized
17 under the laws of the State of Kansas with its headquarters in Kansas. (Id. at 4.) Plaintiffs
18 allege they purchased natural gas directly from one or more Defendants, and from other
19 natural gas sellers in the State of Kansas, during the years 2000-2002. (Id. at 3-4.)

20 According to the Amended Complaint, Defendant Duke Energy Corporation²
21 (“Duke”) is a North Carolina corporation with its principal place of business in Charlotte,
22 North Carolina. (Id. at 13.) Plaintiffs allege during the relevant time period in which Duke
23 allegedly engaged in conspiratorial misconduct, Duke wholly controlled and dominated its

25 ² The Amended Complaint names as a Defendant Duke Energy Corporation. However, on
26 April 3, 2006, Duke Energy Corporation was renamed Duke Power Company LLC in conjunction with
the merger of Duke Energy Corporation and Cinergy Inc.

1 subsidiary Duke Energy Trading and Marketing Company, LLC (“DETM”). (Id.)
2 Plaintiffs allege Duke, directly and through affiliates, entered into a conspiracy which
3 tended to prevent full and free competition or which tended to advance or control the
4 market prices of natural gas. (Id.) Plaintiffs allege Defendants’ alleged conspiracy was
5 “intended to have, and did have, a direct, substantial and reasonably foreseeable effect on
6 United States commerce and on commerce in the State of Kansas.” (Id.) Plaintiffs allege
7 Duke’s officers or directors made, in furtherance of the conspiracy,

8 strategic marketing policies and decisions concerning natural gas and
9 the reporting of natural gas trade information to reporting firms for use
in the calculation of natural gas price indices that affected the market
prices of natural gas, and those policies and decisions were
10 implemented on an operational level by affiliates, such as Duke Energy
Trading and Marketing Company, L.L.C., in the United States and in
11 the State of Kansas.

12 (Id. at 13-14.)

13 According to the Amended Complaint, Duke is subject to personal jurisdiction in
14 Kansas “based upon the activities of its corporate affiliates, in particular Duke Energy
15 Trading and Marketing, L.L.C., that traded and sold natural gas in the United States and in
16 the State of Kansas during the relevant period.” (Id. at 14.) Plaintiffs also allege that in
17 September 2003, Duke and DETM paid \$28 million in civil penalties to the United States
18 Commodity Futures Trading Commission to settle charges of false reporting and attempted
19 manipulation of natural gas prices. (Id.)

20 Under Federal Rule of Civil Procedure 12(b)(2), Defendant Duke moves to
21 dismiss for lack of personal jurisdiction because it has no contacts with the State of Kansas
22 to support either general or specific jurisdiction under federal due process. Duke also
23 argues it cannot be subjected to personal jurisdiction in Kansas under an alter ego or agency
24 theory of personal jurisdiction. In support of its motion, Duke submitted a Declaration of
25 Sue Harrington (“Harrington”), Assistant Secretary of Duke Energy Corporation, the parent
26 company of Defendant Duke, and a Declaration of Brent Bailey (“Bailey”), Vice President

1 and General Counsel for Duke Energy Americas.

2 In her Declaration, Harrington states Duke primarily has been engaged in the
 3 generation, transmission, distribution, and sale of electric energy in central and western
 4 North Carolina and western areas of South Carolina. (Def. Duke Power Company LLC's
 5 Mot. to Dismiss for Lack of Personal Jurisdiction, Decl. of Sue Harrington ["Harrington
 6 Decl."], at 2.) Harrington also states Duke has not maintained an office in Kansas, has not
 7 applied for or received a certificate of authority to conduct business in Kansas, did not
 8 maintain records in Kansas, did not hold corporate meetings in Kansas, and does not have a
 9 registered agent in Kansas. (Id. at 3.) In addition, Harrington states no director of Duke is
 10 an officer or director of DETM, Duke's assets are maintained separately from DETM's
 11 assets, and Duke's corporate records are maintained separately from the corporate records
 12 of DETM.³ (Id.) Bailey's Declaration states that Duke "has not reported, or participated in
 13 any way in the reporting of, prices or volumes of natural gas transactions to Gas Daily,
 14 Inside FERC, Natural Gas Intelligence, Natural Gas Week, Daily Gas Price Index, Weekly
 15 Gas Price Index, or similar natural gas price index publications." (Def. Duke Power
 16 Company LLC's Mot. to Dismiss for Lack of Personal Jurisdiction, Decl. of Brent Bailey
 17 ["Bailey Decl."], at 1.)

18 Plaintiffs respond that they have met their *prima facie* burden under the long-arm
 19 statute because the Amended Complaint alleges Duke's affiliates transacted business in
 20 Kansas in furtherance of a conspiracy to which Duke was a party. In addition, Plaintiffs
 21 contend the Kansas long-arm statute covers tortious conduct occurring outside of Kansas
 22 that causes injury in Kansas and that Duke's antitrust violations constitute a tort.

23
 24 ³ Harrington's Declaration also contains a number of statements made "on information and
 25 belief." Because these statements are not made upon personal knowledge, the Court will not consider
 26 them in deciding the motion to dismiss. See Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1421-13 (9th
 Cir. 1995) (explaining that declaration upon information and belief was entitled to "no weight because
 the declarant did not have personal knowledge.")

1 Moreover, Plaintiffs argue Duke is subject to jurisdiction in Kansas under the conspiracy
2 theory of jurisdiction. Plaintiffs did not present any evidence to support their jurisdictional
3 allegations in the Amended Complaint.

4 **II. DISCUSSION**

5 "When a defendant moves to dismiss for lack of personal jurisdiction, the
6 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
7 defendant." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
8 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
9 permitted under the applicable state's long-arm statute and (2) that the exercise of
10 jurisdiction does not violate federal due process. Id. In diversity cases such as this, "a
11 federal court applies the personal jurisdiction rules of the forum state provided the exercise
12 of jurisdiction comports with due process." Scott v. Breeland, 792 F.2d 925 (9th Cir.
13 1986). However, "federal law is controlling on the issue of due process under the United
14 States Constitution." Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3
15 (9th Cir. 1977). Therefore, the Court will apply Kansas law in deciding whether personal
16 jurisdiction is appropriate under the Kansas long-arm statute and the Court will apply Ninth
17 Circuit law in deciding whether jurisdiction is appropriate under the due process clause.
18 See In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987)
19 (concluding that "the transferee court [should] be free to decide a federal claim in the
20 manner it views as correct without deferring to the interpretation of the transferor circuit.");
21 Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) (holding that "a transferee federal court
22 should apply its interpretations of federal law, not the constructions of federal law of the
23 transferor circuit").

24 Under the Kansas long-arm statute, "[a]ny person, whether or not a citizen or
25 resident of this state, who in person or through an agent or instrumentality does any of the
26 acts hereinafter enumerated, thereby submits the person and, if an individual, the

1 individual's personal representative, to the jurisdiction of the courts of this state" Kan.
 2 Stat. Ann. § 60-308(b). Examples of enumerated acts include transacting business within
 3 Kansas, committing a tortious act within Kansas, and owning, using, or possessing real
 4 estate in Kansas. Id. "The Kansas long arm statute . . . is liberally construed to assert
 5 personal jurisdiction over nonresident defendants to the full extent permitted by the due
 6 process clause of the Fourteenth Amendment to the United States Constitution." In re
 7 Heston Corp., 870 P.2d 17, 25 (Kan. 1994).

8 To satisfy due process, a nonresident defendant must have "minimum contacts"
 9 with the forum state so that the assertion of jurisdiction does not offend traditional notions
 10 of fair play and substantial justice. Pebble Beach Co., 453 F.3d at 1155 (citing Int'l Shoe
 11 Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district court may exercise either
 12 general or specific personal jurisdiction. See Helicopteros Nacionales de Colombia, S.A. v.
 13 Hall, 466 U.S. 408, 414-15 (1984). Because Plaintiffs do not contend general jurisdiction
 14 applies, the Court will determine whether specific jurisdiction is appropriate in this case.

15 A nonresident defendant's contacts with the forum state may permit the exercise
 16 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
 17 the forum or purposefully availed himself of the privileges of conducting activities within
 18 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
 19 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
 20 Pebble Beach Co., 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
 21 jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v.
 22 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

23 Under the first prong of the "minimum contacts test," the plaintiff must establish
 24 either that the defendant "(1) purposefully availed himself of the privilege of conducting his
 25 activities in the forum, or (2) purposefully directed his activities toward the forum." Pebble
 26 Beach, 453 F.3d at 1155. "Evidence of availment is typically action taking place in the

1 forum that invokes the benefits and protections of the laws in the forum.” Id. Evidence of
 2 direction usually consists of conduct taking place outside the forum that the defendant
 3 directs at the forum. Id. at 1155-56.

4 The purposeful direction aspect of the first prong is satisfied when a foreign act is
 5 both aimed at and has effect in the forum. Id. In other words, the defendant “must have (1)
 6 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
 7 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
 8 suffered in the forum state.” Id. To satisfy the third element of this test, the plaintiff must
 9 establish the defendant’s conduct was “expressly aimed” at the forum; a “mere foreseeable
 10 effect” in the forum state is insufficient. Id. The “express aiming” requirement is satisfied
 11 when the defendant is alleged to have engaged in wrongful conduct “individually targeting
 12 a known forum resident.” Bancroft & Masters, Ins. v. Augusta Nat. Inc., 223 F.3d 1082,
 13 1087 (9th Cir. 2000).

14 The second prong of the specific jurisdiction test requiring that the contacts
 15 constituting purposeful availment or purposeful direction give rise to the current action, is
 16 measured in terms of “but for” causation. Id. at 1088. Under the last prong of the specific
 17 jurisdiction test, courts generally consider a variety of factors to determine whether
 18 exercising jurisdiction would be reasonable:

19 (1) the extent of the defendant’s purposeful interjection into the forum
 20 state, (2) the burden on the defendant in defending in the forum, (3) the
 21 extent of the conflict with the sovereignty of the defendant’s state, (4)
 22 the forum state’s interest in adjudicating the dispute, (5) the most
 23 efficient judicial resolution of the controversy, (6) the importance of
 24 the forum to the plaintiff’s interest in convenient and effective relief,
 25 and (7) the existence of an alternative forum.

26 Id. A court must balance all seven factors and no factor is determinative. Core-Vent Corp.
 27 v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993).

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1 Where the issue is before the Court on a motion to dismiss based on affidavits
 2 and discovery materials without an evidentiary hearing, the plaintiff must make “a prima
 3 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
 4 dismissal.” Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284
 5 F.3d 1114, 1119 (9th Cir. 2002). The Court accepts as true any uncontested allegations
 6 in the complaint and resolves any conflicts between the facts contained in the parties’
 7 evidence in the plaintiff’s favor. Id. However, for personal jurisdiction purposes, a court
 8 “may not assume the truth of allegations in a pleading which are contradicted by affidavit.”
 9 Alexander v. Circus Circus Enter., 972 F.2d 261, 262 (9th Cir. 1992).

10 **A. Transacting Business under Agency or Alter Ego Theory**

11 Business is transacted within Kansas when a person is within or enters the state in
 12 person or by agent and deals with another within the state and thereby “effectuates or
 13 attempts to effectuate a purpose to improve his economic conditions and satisfy his
 14 desires.” Volt Delta Resources, Inc. v. Devine, 740 P.2d 1089, 1092 (Kan. 1987).
 15 However, “mere ownership of all stock of a subsidiary will not, in and of itself, subject the
 16 parent corporation to the jurisdiction of the state where the subsidiary is doing business.
 17 The test is whether the local corporation’s identity as a distinct corporate identity is
 18 observed.” Farha v. Signal Companies, Inc., 532 P.2d 1330, 1337 (Kan. 1975) (citing
 19 Cannon Mfg. Co. v. Cudahy Co., 267 U.S. 333 (1925)). “[W]hen a corporation exercises
 20 such control and domination over its subsidiary that it no longer has a will, mind, or
 21 existence of its own, and operates merely as a department of the parent corporation, both
 22 corporations should be treated as a single economic entity.” Id. at 1338; see also Snowden
 23 By & Through Victor v. Connaught Labs., Inc., 793 F. Supp. 1040, 1043 (D. Kan. 1992)
 24 (concluding that “the degree and direction of control exerted by one corporation over the
 25 other and the flow of benefits from the forum are all relevant in determining the nature of
 26 the relationship”).

1 “[A] wholly owned subsidiary may be an agent and when its activities as an agent
 2 are of such a character as to amount to doing business of the parent, the parent is subjected
 3 to the *in personam* jurisdiction of the state” Quarles v. Fuqua Indus., Inc., 504 F.2d
 4 1358, 1364 (10th Cir. 1974) (quotation omitted). Further, “[o]ne company’s exercise over a
 5 second corporation of a controlling influence through stock ownership does not make the
 6 second corporation an agent of the first.” Id.

7 Under the alter ego theory, Kansas law will not extend the fiction of separate
 8 corporate identities where some fraud or injustice would result. Dean Operations, Inc. v.
 9 One Seventy Assocs., 896 P.2d 1012, 1016 (Kan. 1995). “The ultimate test for imposing
 10 alter ego status is whether, from all of the facts and circumstances, it is apparent that the
 11 relationship between the parent and subsidiary is so intimate, the parent’s control over the
 12 subsidiary is so dominating, and the business and assets of the two are so mingled that
 13 recognition of the subsidiary as a distinct entity would result in an injustice to third parties.”
 14 Doughty v. CSX Transp., Inc., 905 P.2d 106, 111 (Kan. 1995).

15 In making this determination, Kansas courts weigh ten factors: (1) whether the
 16 parent corporation owns all or a majority of the capital stock of the subsidiary; (2) whether
 17 the corporations have common directors or officers; (3) whether the parent corporation
 18 finances the subsidiary; (4) whether the parent corporation subscribed to all of the capital
 19 stock of the subsidiary or otherwise caused its incorporation; (5) whether the subsidiary has
 20 grossly inadequate capital; (6) whether the parent corporation pays the salaries or expenses
 21 or losses of the subsidiary; (7) whether the subsidiary has substantially no business except
 22 with the parent corporation or no assets except those conveyed to it by the parent
 23 corporation; (8) whether the parent corporation’s papers and its officers’ statements refer to
 24 the subsidiary as a department or division; (9) whether the subsidiaries’ directors or
 25 executives do not act independently in the subsidiaries’ interest but take direction from the
 26 parent corporation; and (10) whether the formal legal requirements of the subsidiary as a

1 separate and independent corporation are not observed. Id.

2 Plaintiffs have not satisfied their burden of establishing personal jurisdiction over
3 Duke based on an agency theory. Subjecting Duke to jurisdiction in Kansas based upon
4 DETM's or any of Duke's other affiliates' alleged business transactions in Kansas would be
5 inappropriate because Plaintiffs have not sufficiently alleged or shown that Duke exercises
6 such domination and control over its subsidiaries that they no longer have a will, mind, or
7 existence of their own. Plaintiffs' Amended Complaint alleges Duke "dominated and
8 controlled" its affiliates but does not include facts to support this conclusory statement.
9 Further, nowhere in the Amended Complaint do Plaintiffs allege DETM activities in Kansas
10 amounted to conducting Duke's business. According to Harrington's Declaration, Duke's
11 business primarily consists of the generation, transmission, distribution, and sale of electric
12 energy in North Carolina and South Carolina. Conversely, the Amended Complaint alleges
13 DETM "buys, sells, stores, and transports natural gas, including its own or its affiliates'
14 production, in the United States and in the State of Kansas." (Am. Compl. at 15.)

15 Moreover, Plaintiffs' allegation that Duke "made strategic marketing policies and
16 decisions concerning natural gas and the reporting of natural gas" which were
17 "implemented on an operational level by affiliates" does not mean DETM was Duke's agent
18 because Duke's controlling influence over DETM through stock ownership does not create
19 an agency relationship. Plaintiffs have not alleged or presented any evidence that Duke
20 exerted control over DETM by any means other than stock ownership. Consequently, in
21 light of Harrington's Declaration, Plaintiffs' allegations in the Amended Complaint,
22 without more, do not establish Duke is subject to jurisdiction in Kansas based upon
23 DETM's or any of its other affiliates' alleged contacts under an agency theory.

24 Further, Plaintiffs have failed to satisfy their burden under the alter ego theory of
25 jurisdiction. Plaintiffs made no attempt to allege facts supporting jurisdiction under the ten-
26 factor test and have not shown that Duke's relationship with DETM or its other affiliates is

1 so intimate and dominating, and that the business and assets of Duke and its affiliates are so
 2 mingled, that recognition of Duke's affiliates, such as DETM, as separate entities would
 3 result in an injustice. However, even if Plaintiffs had made such allegations, Harrington's
 4 Declaration would contradict them. (See Harrington Decl. at 3. [stating that Duke and
 5 DETM have separate officers and directors, Duke's assets are maintained separately from
 6 DETM's assets, and Duke's corporate records are maintained separately from DETM's
 7 corporate records].) Plaintiffs failed to produce any competing evidence. For all of these
 8 reasons, Plaintiffs failed to meet their burden of establishing personal jurisdiction over
 9 Duke under the alter ego theory.

10 **B. Tortious Act**

11 The Kansas long-arm statute allows a plaintiff to bring suit in Kansas to recover
 12 for injuries occurring in Kansas that resulted from tortious conduct outside the state. Ling
 13 v. Jan's Liquors, 703 P.2d 731, 734 (Kan. 1985). A plaintiff's injury may be either physical
 14 or economic. Merriman v. Crompton Corp., 146 P.3d 162, 180 (Kan. 2006). Under
 15 Kansas law, "a price-fixing conspiracy may be a tortious act under K.S.A. 60-308(b)(2)."
 16 Id. at 181.

17 In Merriman, the Kansas Supreme Court held that a Kansas plaintiff could sue a
 18 group of non-resident defendants in Kansas because the plaintiff paid an inflated price for
 19 tires purchased in Kansas as a result of an out-of-state price-fixing agreement between the
 20 defendants. Id. at 167. The Kansas Supreme Court reasoned that a price-fixing conspiracy
 21 constituted tortious conduct under the Kansas long-arm statute and that at the time the
 22 defendants entered into the price-fixing conspiracy, they reasonably could have expected
 23 the conspiracy to reach Kansas consumers. Id. at 181, 187.

24 Plaintiffs allege Duke and the other Defendants "entered into a combination and
 25 conspiracy which tended to prevent full and free competition in the trading and sale of
 26 natural gas, or which tended to advance or control the market prices of natural gas." (Am.

1 Compl. at 13.) Plaintiffs allege Defendants' conspiracy injured them because they paid
2 more for natural gas than they would have paid absent Defendants' conspiracy, were
3 deprived of the benefit of full and free competition, and were deprived of the right to make
4 risk management, resource allocation and other financial decisions in a full and free
5 competitive market. (Id. at 37-38.) Based on Kansas law, Defendants' alleged conspiracy
6 to advance or control prices and to report falsely gas trade information is a tortious act
7 under Kan. Stat. Ann. § 60-308(b)(2). Further, Kansas law permits Plaintiffs to bring suit
8 in Kansas to recover for their injuries occurring in Kansas that resulted from Defendants'
9 alleged antitrust conspiracy outside the state.

10 However, under federal law, specific jurisdiction does not exist over Duke based
11 on the tortious act provision of the Kansas long-arm statute. Under the first prong of the
12 specific jurisdiction test, Plaintiffs have not sufficiently alleged or shown that Duke
13 purposefully availed itself of the privilege of conducting activities in Kansas. Plaintiffs
14 have failed to show Duke itself took actions inside Kansas invoking the benefits and
15 protections of its laws. Instead, Plaintiffs alleged Duke is subject to personal jurisdiction in
16 Kansas based on its affiliates' activities within the forum.

17 In addition, Plaintiffs have failed to satisfy the purposeful direction test because
18 the "express aiming" prong requires Plaintiffs to allege Duke engaged in wrongful conduct
19 targeted at a plaintiff whom Duke knows to be a resident of the forum state. Plaintiffs did
20 not make such an allegation. Under Ninth Circuit law, Plaintiffs' broad allegations that
21 Duke's actions "tended" to prevent free competition or tended to advance or control "the
22 market prices of natural gas" do not satisfy the express aiming requirement. Likewise,
23 Plaintiffs' allegation that Duke's actions "were intended to have, and did have, a direct,
24 substantial and reasonably foreseeable effect on United States commerce and on commerce
25 in the State of Kansas" does not pass the express aiming requirement. Broad allegations
26 that Duke's participation in a conspiracy tended to affect market prices of natural gas

1 generally and that it was reasonably foreseeable that such conspiracy would affect
2 commerce throughout the United States and commerce in Kansas is insufficient to establish
3 the first prong of the specific jurisdiction test. Consequently, because Plaintiffs have not
4 met their burden of establishing the first prong of the specific jurisdiction test, exercising
5 jurisdiction under a tortious act theory would violate due process.

6 **C. Conspiracy Theory**

7 Plaintiffs also argue that they may use the conspiracy theory of personal
8 jurisdiction as an alternative basis for establishing personal jurisdiction over Duke.
9 Plaintiffs contend the Kansas Supreme Court expressly adopted the conspiracy theory in
10 Merriman and that pursuant to the theory, where a co-conspirator commits a tort that has
11 foreseeable consequences in Kansas, a defendant who is a participant in the conspiracy is
12 also subject to personal jurisdiction in Kansas. Defendants respond that while Kansas may
13 accept the conspiracy theory of jurisdiction, the Ninth Circuit rejects the conspiracy theory
14 because it violates due process principles. In addition, Defendants argue Plaintiffs failed to
15 produce any factual support for their conspiracy theory allegations.

16 Kansas law recognizes that “if one conspirator commits acts in Kansas in
17 furtherance of the conspiracy and that conspirator falls under the act, jurisdiction can be
18 obtained as to all conspirators.” Merriman, 146 P.3d at 181. In Merriman, the Kansas
19 Supreme Court concluded that because the alleged conspiracy resulted in alleged economic
20 injury to the plaintiff in Kansas, jurisdiction over the defendants’ tortious conduct could be
21 based on the defendants’ deliberate choice to enter into a conspiracy. Id. at 187. The policy
22 behind the conspiracy theory is to allow a court “to assert jurisdiction over [those] whom
23 jurisdiction would otherwise be lacking.” Id. at 182. The Kansas Supreme Court has noted
24 that “asymmetry would result if coconspirators are allowed to enjoy the benefits and
25 protections of the forum state’s laws without being subject to personal jurisdiction in that
26 forum.” Id. at 186.

1 However, “[m]ere allegation of conspiracy, without some sort of *prima facie*
 2 factual showing of a conspiracy, cannot be the basis of personal jurisdiction of
 3 co-conspirators outside the territorial limits of the court.” Dodson Int’l Parts, Inc. v.
 4 Altendorf, 181 F. Supp. 2d 1248, 1254 (D. Kan. 2001). “[C]ourts faced with allegations of
 5 a conspiracy to commit a ‘business tort’ which has foreseeable consequences in the forum
 6 state [should] uphold jurisdiction unless the allegations of conspiracy are too conclusory,
 7 too unsupported to be given credence.” Prof’l Investors Life Ins. Co. v. Roussel, 445 F.
 8 Supp. 687, 696 (D. Kan. 1978).

9 Although the Ninth Circuit has not expressly accepted or rejected the conspiracy
 10 theory of personal jurisdiction, it rejected the conspiracy theory in the venue context, and
 11 federal district courts in the Ninth Circuit have rejected the theory as applied to personal
 12 jurisdiction. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 492 (9th Cir.
 13 1979) (rejecting conspiracy theory of venue); Kipperman v. McCone, 422 F. Supp. 860, 873
 14 n.14 (N.D. Cal. 1976) (finding that “personal jurisdiction over any non-resident individual
 15 must be premised upon forum-related acts personally committed by the individual” and that
 16 “imputed conduct is a connection too tenuous to warrant the exercise of personal
 17 jurisdiction”); Karsten Mfg. Corp. v. U.S. Golf Ass’n, 728 F. Supp. 1429, 1434 (D. Ariz.
 18 1990) (same); see also Steinke v. Safeco Ins. Co. of Am., 270 F. Supp. 2d 1196, 1200 (D.
 19 Mont. 2003); Silver Valley Partners, LLC v. De Motte, 400 F. Supp. 2d 1262, 1268 (W.D.
 20 Wash. 2005).

21 Regardless of whether the Ninth Circuit would accept or reject the conspiracy
 22 theory of personal jurisdiction, for the same reason Plaintiffs failed to establish specific
 23 jurisdiction under a tortious act theory, Plaintiffs have failed to establish specific
 24 jurisdiction under a conspiracy theory. Plaintiffs broad and conclusory allegations that
 25 Duke entered into a “combination and conspiracy” with the other Defendants in this action
 26 “which tended to advance or control the market prices of natural gas” or which “tended to

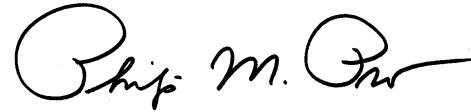
1 prevent full and free competition" or which effected United States commerce or commerce
2 in Kansas do not satisfy the express aiming requirement under the due process analysis.
3 Further, Plaintiffs' allegation that all of the Defendants in this action conspired to commit
4 unlawful acts that they reasonably could foresee would injure Plaintiffs and others in the
5 State of Kansas is insufficient under the express aiming requirement. A "foreseeable effect"
6 in the forum state is inadequate to show the purposeful direction necessary to establish
7 specific jurisdiction. The Ninth Circuit requires an allegation that Duke engaged in
8 wrongful conduct, whether a conspiracy or some other conduct, that individually targets a
9 known forum resident. Because Plaintiffs failed to make such an allegation, specific
10 jurisdiction is lacking in this case and therefore subjecting Duke to jurisdiction in Kansas
11 under a conspiracy theory would violate due process. The Court therefore will grant
12 Defendant Duke's motion to dismiss for lack of personal jurisdiction.

13 **III. CONCLUSION**

14 IT IS THEREFORE ORDERED that Defendant Duke Power Company LLC's
15 Motion to Dismiss for Lack of Personal Jurisdiction (2:03-CV-1431-PMP-PAL, Doc. #427;
16 2:06-CV-0233-PMP-PAL, Doc. #58) is hereby GRANTED. Plaintiffs' Amended
17 Complaint is hereby dismissed without prejudice against Defendant Duke Power Company,
18 LLC, formerly known as and named in the caption as Duke Energy Corporation, for lack of
19 personal jurisdiction.

20
21 DATED: August 17, 2007.

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PHILIP M. PRO
United States District Judge